United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

court

76-7036

76-7115

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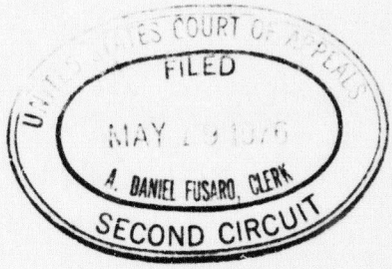

Docket Nos. 76-7036 and 76-7115

ISAAC LORA, etc., et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

- against -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants-Appellees.

PETITION OF APPELLANTS FOR
REHEARING EN BANC

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QUESTION PRESENTED

Should plaintiffs-appellants, who instituted this civil rights action on behalf of themselves and other minority group school children for declaratory and injunctive relief, be granted a rehearing en banc from that part of an order of a panel of this Court which held that plaintiffs-appellants did not have a right to appeal a district court order denying their motion for class action certification?

PRELIMINARY STATEMENT

Plaintiffs-appellants ("appellants") submit this petition for a rehearing en banc, pursuant to Rule 35 of the

Federal Rules of Civil Procedure, from that part of an order of a panel of this Court (Hays, Mulligan, Palmieri, J.) entered on May 5, 1976, which affirmed from the bench and with costs to be taxed against appellants, an order of the Eastern District of New York (Bruchhausen, J.) denying appellants' motion for class action certification.

A rehearing en banc is necessary both to secure and maintain uniformity of decisions in this Circuit and to resolve a question of exceptional importance. Specifically, appellants seek review of the panel's holding that Judge Bruchhausen's order denying class designation so essential to this civil rights action was not appealable.

Appellants submit that the panel, disavowing our constitutional heritage, has prevented the minority group public school children involved in the case at bar from fully litigating and seeking a complete remedy for alleged violations of their civil rights. (See McRedmond v. Wilson, 75-7389 n.1 (2d Cir. 1976)). Additionally, the panel's decision establishes an arbitrary judicial screen, contemplated neither by the constitution nor Congress, which can only be viewed as a repudiation of the line of cases since Brown v. Board of Education, 347 U.S. 483 (1954), which have encouraged the use of class action litigation by minority groups to

vindicate deprivation of constitutional rights.*

STATEMENT OF THE CASE

This is a civil rights action instituted by seven Black and Hispanic youths who were placed into "special day schools for the socially maladjusted and emotionally disturbed," operated by the New York City Board of Education, also known as "SMED" schools, and formerly named "600" schools. Appellants allege that the SMED schools constitute a racially discriminatory system which promotes the removal of minority group children from the regular school system. (Over 92% of the SMED school population is Black and Hispanic, while about 60% of the regular school system is Black and Hispanic).

Appellants claim that they were classified as "socially maladjusted and emotionally disturbed" and segregated into the SMED schools without necessary due process safeguards. Moreover, even assuming that SMED school children have difficulty adjusting to the structure of the present regular school class, appellants contend that less restrictive and racially segregated

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*The panel also affirmed Judge Bruchhausen's order denying appellants' motion for a preliminary injunction on procedural due process and search and seizure claims. Appellants are not requesting a rehearing en banc from this part of the panel's order. However, they submit that the panel not only applied the wrong standard of review for the lower court's refusal to grant some immediate relief, but it gave little respect to basic constitutional principles. See p. 14, infra.

and more effective educational alternatives could have been made available to them. Therefore, they claim, inter alia, that their rights, and the rights of other minority group children now segregated into the SMED school system, to due process, equal protection and equal educational opportunity have been violated by the defendants.

In the court below, appellants sought to represent a class consisting of themselves and the other minority students segregated into the SMED schools. There are presently seventeen SMED schools, all at the junior and senior high school level. The total student population is about 2,800. Although appellants' allegations presented the paradigm circumstances for class action certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure, Judge Bruchhausen refused to grant appellants their entitlement under the statute. Erroneously relying on Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936, and paraphrasing the Corporation Counsel's statement that defendants will halt any actions as to all SMED students determined to be unconstitutional, the lower court, without holding any hearing, held that:

> It is unnecessary to consider whether the requirements of Rule 23 have been

> satisfied, because the court...concludes that a class action status in unnecessary.

After stating that Judge Bruchhausen's order denying class designation was nonappealable, the panel suggested that the lower court order was proper, anyway, since relief for the named plaintiffs would inure to the benefit of the class, citing Galvan. The panel's reliance on Galvan is as misplaced as Judge Bruchhausen's and ignores the necessity of a class determination for full litigation of the system-wide issues involved in this case. In fact, the necessity for class status in this case presents the grounds for this Court to confer jurisdiction over the appeal from the lower court order.

ARGUMENT

A REHEARING EN BANC IS NECESSARY BECAUSE THE PANEL'S DECISION CONTRADICTS SUBSTANTIAL JUDICIAL PRECEDENT AND FRUSTRATES THE RIGHT OF PERSONS TO LITIGATE FULLY AND TO SEEK A COMPLETE REMEDY FOR ALLEGED VIOLATIONS OF CONSTITUTIONAL RIGHTS.

As a general rule, an order denying class action certification, which permits the individual case to proceed, is not a "final" order which may be appealed as of right under 28 U.S.C. § 1291, nor is it an interlocutory order of the kind

from which an immediate appeal may be taken under 28 U.S.C. § 1292. Eisen v. Carlisle & Jacquelin ("Eisen I"), 370 F.2d 119, 120 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967); Jones v. Diamond, 519 F.2d 1090, 1095 (5th Cir. 1975). However, federal appellate courts have developed exceptions to the general rule which the panel in this case neglected to recognize.

A. Appealability Under 28 U.S.C. § 1292(a)(1)

The district court's order denying class action certification has, in effect, narrowed the scope of injunctive relief available to appellants and, hence, an appeal from the order may be taken as of right under 28 U.S.C. § 1292(a)(1).* Although appellants raised this point on appeal, the panel never responded to it.

Appellants are not merely alleging that they alone are

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*28 U.S.C. § 1292 Interlocutory decisions
(a) The courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

being deprived of adequate education and procedural due process and are being racially discriminated against and subject to other unconstitutional practices. Rather, they contend that such deprivations are common to a large class of minority group children. Their complaint sought permanent injunctions, on behalf of the named plaintiffs and members of their class, sufficient to rectify the unconstitutional acts and omissions alleged. Judge Bruchhausen and the panel which condoned his actions have prevented appellants from obtaining the broad injunctive relief explicitly requested in the complaint.*

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*Compare Rodriguez v. Percell, 391 F.Supp. 38 (S.D.N.Y. 1975), where the court rejected the New York City Board of Education's argument that because Hispanic students were suing on grounds generally applicable to the purported class, class action designation was unnecessary. Judge Frankel said, at 41 n.2:

> Defendants point out that the City may be relied upon to obey any final decree in this case, suggesting that it is therefore unnecessary to hold the action to be on behalf of a class. The same may be said, however, in the great bulk of cases for which subdivision (b)(2) or Rule 23 was written. The least that can be said on the other side is that the rule plainly applies, that there is no discernible prejudice to defendants in applying it, and that plaintiffs are entitled to have the full scope of their decree made explicit and unmistakable.

In Brunson v. Board of Trustees of School District No. 1 of Clarendon County South Carolina, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963), Black children sought injunctive relief against a school board which was allegedly maintaining a biracial school system. The district court dismissed the class action, allowing the suit to proceed only on an individual basis. The Fourth Circuit took jurisdiction over an appeal from the district court's order under § 1292 (a)(1), stating at 108, that:

> The order...was a denial of the broad injunctive relief which the plaintiffs sought, which presumably, would have affected all schools and all grades in the School District. The order was, therefore, an appealable one under § 1292, for it was a denial of the broad injunctive relief which the plaintiffs sought.

Several other circuits have followed the reasoning of the court in Brunson and have taken jurisdiction over appeals, under § 1292(a)(1), from orders denying class actions when "the substantial effect [of the order] is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits." Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir. 1972); See Jones v. Diamond, 519 F.2d, supra, at 1095-1097 (5th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974).

Significantly, although the Third Circuit rejected use of the "death knell" doctrine in Hackett v. General Host Corporation, 455 F.2d 618 (3rd Cir. 1972) (see subpoint "B" infra), it realized at 622 that:

> ...Eisen is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. § 1292 (a)(1).... This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitality to class action litigation involving civil rights.... (emphasis added)

Appellants' prayer for a system-wide injunction against the deprivation of civil rights of minority group children constitutes "the heart of the relief" they seek. Jones v. Diamond, supra, at 1095.*

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*The panel's decision conflicts with this Court's statement in City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 299 (2d Cir. 1969). This Court, in rejecting the City's argument that an appeal should be heard under § 1292 (a)(1), from a district court denial after hearings were held, of a class action motion, stated that "[t]he cases cited by the City dealing with injunctive relief sought by school children to prevent discrimination on the ground of race have no application here." Moreover, the Second Circuit has accepted jurisdiction of an appeal from a pre-trial discovery order on the theory that the order "inclines more to the side of mandatory injunctive relief." Parents Comm. of Public School 19 v. Community School Board 14 of New York City, 524 F.2d 1138, 1141 (2d Cir. 1975).

B. The "Death Knell" Doctrine

This Circuit has recognized that orders denying class certification are appealable as of right when they "end the lawsuit for all practical purposes." Eisen I, supra, 370 F.2d at 120.

> Where the effect of a district court's order [denying a class action motion], if not reviewed, is the death knell of the action, review should be allowed.

Although the "death knell" doctrine has not gained universal acceptance, it has been recognized by other circuits as a legitimate exception to the technical requirement of "finality" under 28 U.S.C. § 1291. Blackie v. Barrack, 524 F.2d 891, 896 (9th Cir. 1975); Ott v. Speedwriting Publishing Company, 518 F.2d 1143, 1149 (6th Cir. 1975); Monwich Asphalt Sales Co. v. Wilshire Oil Company of Texas, 511 F.2d 1073, 1076-7 (10th Cir. 1975).

A sound basis exists for the "death knell" doctrine. Federal courts must give the requirement of "finality" under § 1291 "a practical rather than a technical construction" by evaluating

> the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511....

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974).

Application of the "death knell" doctrine to the instant case is mandated by the teaching of the Supreme Court that, in some cases, a class needs to be certified in order to prevent termination of the lawsuit prior to exhaustion of appellate review on the ground of mootness. Board of School Commissioners v. Jacobs, 95 S.Ct. 848 (1975); Sosna v. Iowa, 95 S.Ct. 553 (1975); Weinstein v. Bradford, 96 S.Ct. 347 (1975). When giving the instant order denying class certification a "practical" construction, it is apparent that this Court has jurisdiction over the appeal.*

The district court's order and the panel's acceptance of it has rung "a death knell on the prosecution of the action." See Galvan v. Levine, supra. All the named plaintiffs will lose standing to raise the issues involved in the complaint before

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*Appellants submit that use of the "death knell" doctrine in the instant case does not broaden its interpretation, but, rather, applies it to narrow circumstances where the ends of justice mandate immediate appellate review. In fact, the "weaknesses" in using the doctrine in securities cases (Parkinson v. April Industries, Inc., 520 F.2d 650, 658-660 (2d Cir. 1975) (Judge Friendly concurring)) are not evident here. This Court will merely be recognizing the relationship between cases which concern the grievances of public school students and class actions, as expressed by the Supreme Court in Jacobs.

the case can be completely litigated. Only through class certification can mootness be avoided and the lawsuit be litigated to its conclusion. See Board of School Commissioners v. Jacobs, supra; Sosna v. Iowa, supra; Weinstein v. Bradford, supra.*

At the time the complaint was filed, all the named plaintiffs were assigned to SMED schools. When plaintiffs' motion for class certification was made on November 14, 1975, two of the named plaintiffs had already been returned to regular public schools (White, Moore) and another had been discharged from the public school system (Prince). In seeking class action status, appellants informed Judge Bruchhausen that class certification was necessary to preserve the forum. They emphasized that the issues raised, by their very nature, would not remain ripe for the named plaintiffs until the lower court proceedings were completed and appellate review was exhausted. See Jacobs, supra, at 850.

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*In Galvan, the Second Circuit held that denial of class action designation would not "ring a death knell on the prosecution of the action" since a final decision had already been made in favor of the named plaintiffs, the City had submitted an affidavit stating that it understood the entered judgment to bind it to all claimants, and, in fact, the defendants already withdrawn the challenged policy even more fully than the court directed. No conceivable mootness question existed nor did denial of class action status create possible prejudice to full litigation of the issues raised.

The SMED school system contains students only at the junior high school and high school levels, so no child can remain in it for more than a few years. (See Jacobs). The population is transient. The time spent in SMED school placement is substantial in the life of a young person, but all the named plaintiffs will leave the SMED and regular school systems prior to the exhaustion of appellate review.*

Events subsequent to appellants' lower court class action motion substantiates that their projections concerning the problem of mootness are accurate. Of the four named plaintiffs still in SMED school placement at the time of said motion, one has moved out of the state (Lora), and the remaining three (Walters, Martin, Lugo) have been returned to the regular public school system "on a trial basis." The case presently escapes mootness under the theory that the issues raised are "capable of repetition, yet evading review." Dunn v. Blumstein, 405 U.S. 330, 333 (1972); Moore v. Ogilvie, 394 U.S. 814 (1969). Clearly, there is a "reasonable expectation" that at least those named plaintiffs who have been returned to the regular school system on a trial basis will be again subjected to SMED school placement. Weinstein v. Bradford, supra, at 349; Sosna v. Iowa, supra, at 557-8. But

*During oral argument, the panel asked counsel why he couldn't intervene more plaintiffs. In response, counsel informed the Court that a "public interest" law firm should not be held to a (continued)

there exists little liklihood that they will retain such standing beyond a few more months.*

(footnote continued)
higher standard than private lawyers (i.e., those who recieve a fee as counsel in securities actions) and, in any event, even intervenors who are in SMED schools when final judgment is made will most likely be discharged before exhaustion of appellate review.

*During oral argument, the panel was quite explicit in demonstrating its negative feelings toward the merits of this action. At first it asked appellants' counsel to explain why the complaint should be found to raise constitutional questions. Appellants submit that if the panel believed that the complaint failed to state a substantial federal question, it should have ordered the lower court to dismiss it. But the panel would not, or could not, reach such a conclusion. Nevertheless, it allowed the action to proceed in its judicially caused crippled state which renders it impossible to litigate fully.

The panel restricted any findings concerning the merits to the procedural due process and search and seizure claims raised in the appeal from the district court's order denying preliminary relief without a hearing. The panel concluded that these two claims were not likely to succeed in the merits. Undoubtedly, the panel's decision overlooks the mandate of the due process clause (Goss v. Lopez, 95 S.Ct. 729 (1975); Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972)) and the Fourth Amendment. However, since the named plaintiffs are not presently in SMED school placement and a class designation has not been made, appellants are not requesting a rehearing en banc on the preliminary injunction issues. Rather, they now hope that their right to a class action and the discovery attendant thereto will be recognized and, then, they will be able to proceed toward full and complete litigation of all the issues.

C. Review of Order Denying Preliminary Injunction Supports Review of Order Denying Class Action Certification

The panel's order conflicts with this Circuit's holding that an appeal from an order which is properly before a federal appellate court supports review of a separate order which, standing alone, is not appealable. San Filippo v. United Brotherhood of Carpenters and Joiners of America , 525 F.2d 508, 512-513 (2d Cir. 1975); see also, Genosick v. Richmond Unified School District, 479 F.2d 482 (9th Cir. 1973). Since this Court had jurisdiction over the instant appellants' appeal from an order denying their motion for a preliminary injunction, the panel should have reviewed appellants' appeal from the order denying class action certification.

CONCLUSION

APPELLANTS REQUEST FOR A REHEARING EN BANC SHOULD BE GRANTED.

Dated: Brooklyn, New York
May 19, 1976

Respectfully submitted,

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